Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-502

CLIFFORD S. STRIKE and
MARJORIE STANLEY STRIKE,

Appellants,

v.

TRANS-WEST DISCOUNT CORPORATION,
T.D. SERVICE COMPANY,

Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

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TRANS-WEST DISCOUNT CORPORATION,
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On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

Clifford S. Strike and Marjorie Stanley Strike, Appellants, appeal from the final judgment of the Supreme Court of California, dated June 27, 1979, denying Appellants a hearing to review the opinion of the Court of Appeal, Fourth Appellate District, Division One, of the State of California, which opinion affirmed a judgment denying Appellants due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States under color of state statutes.

This Court has jurisdiction to review the final judgment of the Supreme Court of California, and it should exercise such jurisdiction herein.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, appears in 92 Cal.App.3d 735, 155 Cal.Rptr. 132, ___ P.2d ___, and is included herein as Appendix "A". The Court of Appeal denied a timely petition for rehearing, and the Supreme Court of California denied a timely petition for hearing.

JURISDICTION

Notice of appeal to this Court was timely and duly filed in the California Court of Appeal, Fourth Appellate District, Division One (the Court having possession of the record of this case), on September 18, 1979, appealing from the final judgment of the California Supreme Court on June 27, 1979. A copy of the notice of appeal is set out in Appendix "C" hereto.

This appeal is being timely docketed in this Court, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2), by virtue of the fact that California state statutes, detailed hereafter, are contended to be unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution, on their face, and as applied.

STATUTES INVOLVED

The California Code of Civil Procedure §§ 1132-34, at all times relevant herein, provided:

> § 1132. Entry of judgment; obligations for which judgment may be confessed.
>
> JUDGMENT MAY BE CONFESSED FOR DEBT DUE OR CONTINGENT LIABILITY. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this Chapter. Such judgment may be entered in any Court having jurisdiction for like amounts.
>
> § 1133. Defendant's written statement; form.
>
> STATEMENT IN WRITING AND FORM THEREOF. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:
>
> 1. It must authorize the entry of judgment for a specified sum;
>
> 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;
>
> 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

§ 1134. Defendant's written statement; filing; entry of judgment; costs; judgment roll.

In courts other than justice courts, the statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter a judgment of such court for the amount confessed with the costs hereinafter set forth. At the time of filing, the plaintiff shall pay as court costs which shall become a part of the judgment the following fees: in superior courts ten dollars ($10) and in municipal courts nine dollars ($9). No fee shall be collected from the defendant. No fee shall be paid by the clerk of the court in which said confession of judgment is filed for the law library fund nor for services of any court reporter. The statement and affidavit, with the judgment endorsed thereon, becomes the judgment roll.

QUESTIONS PRESENTED

1. Are the California confession of judgment statutes, Code of Civil Procedure §§ 1132-34, void and unconstitutional on their face under due process principles by reason of failure to provide for notice and hearing prior to deprivation of a substantial property interest as required by the United States Constitution?

2. Are the California confession of judgment statutes, Code of Civil Procedure §§ 1132-34, void and unconstitutional as applied in this case by reason of their deprivation of substantial due process rights of Appellants in the absence of a knowing waiver?

3. May the California courts permit an obligation purportedly created under constitutionally suspect confession of judgment procedures to be enforced through the summary creditor's remedy of trustee's sale or non-judicial foreclosure under California law, in violation of debtors' constitutional rights to due process of law and notice and hearing prior to deprivation of a substantial property interest?

RAISING THE FEDERAL QUESTION

These substantial federal questions were urged upon the California Court of Appeal and the California Supreme Court, first by letter from counsel to the Court of Appeal, and then, by petition for rehearing following the issuance of the Court's opinion, Appendix "A". The federal questions were likewise urged upon the California Supreme Court in a petition for hearing to review the Court of Appeal's opinion.

Despite the express urging of the federal questions and of existing California precedent based upon federal constitutional law, the California Court of Appeal and the California Supreme Court refused to even address the issue. Rather, in the face of a petition for rehearing that expressly urged: "The judgment is erroneous as a matter of law because it fails to recognize the potential invalidity of the judgment based upon confession pursuant to Code of Civil Procedure § 1133"[potentially invalid because there had been no hearing regarding whether or not there was a knowing waiver], the Court of Appeal stood obdurately by its opinion which declared: "Its [the confession of judgment] validity and enforceability is not in question." 92 Cal.App.3d at 739.

STATEMENT OF THE CASE

Appellants owned a home in San Diego County, California, which they had caused to be constructed themselves. The home and its adjoining acreage had a fair market value shortly after the trial of this action of approximately $850,000. The property was subject to the lien of a deed of trust securing a promissory note with an unpaid balance of approximately $105,000, in favor of Barclays Bank.

In 1973, Appellant Clifford S. Strike signed a continuing guaranty in favor of Appellee Trans-West Discount Corporation regarding a certain business operated by his brother-in-law. The business failed, and on April 23, 1974, Appellant Strike was compelled to execute a confession of judgment in favor of Trans-West Discount Corporation in the amount of $111,204.65. Judgment was entered on the confession in Los Angeles County Superior Court on May 9, 1974, and an abstract of the judgment was recorded in San Diego County on May 23, 1974, and under California law, became a judgment lien against the Strikes' home and other real property.

In 1975, the Strikes had financial difficulties and entered into a complicated consolidation and extension agreement with Appellee Trans-West Discount Corporation. The extension agreement failed, and Appellee sought to enforce the literal terms of the agreement, including forfeiture of Appellants' rights by recordation of a grant deed and commencement of an unlawful detainer action. This effort failed, but Appellees then commenced foreclosure of the deed of trust. Appellants Strike brought this actin to enjoin the foreclosure sale and otherwise obtain a declaration of their rights and obligations.

In 1977, the matter was tried in the San Diego County Superior Court. By judgment entered on August 22, 1977, the court held that the consolidation and extension agreement was usurious, but that the usury did not affect the validity and enforceability of the underlying obligations, the confession of judgment and the Barclays Bank deed of trust. The court further held that Trans-West was entitled to interest on the confession of judgment and the note secured by the deed of trust from the date of inception and acquisition, respectively, to the date of payment. Trans-West was authorized by the judgment to enforce both these obligations either by judicial foreclosure or pursuant to the non-judicial power of sale foreclosure contained in the deed of trust. Finally, the court concluded that Trans-West was entitled to submit at the non-judicial foreclosure a credit bid in the amount of $295,436.32, plus interest at $59.07 per day until payment, which included the entire amounts due under both the confession of judgment and the deed of trust with accrued interest on both. See the judgment of the trial court which is included herewith as Appendix "B".

Appellee Trans-West Discount Corporation immediately proceeded to elect the non-judicial method of foreclosure in order to obtain Appellants' residence. Despite attempts by the Strikes to challenge or defer the summary non-judicial foreclosure procedures, on January 6, 1978, the foreclosure proceeded to sale. By making a credit bid based not only on the amount due under the deed of trust and accrued interest, but also based upon the amount due under the confession of judgment, Appellee Trans-West was the successful bidder at the sale. Trans-West has proceeded to evict Appellants from their home, and unless this Court acts, Appellants will have forfeited their equity in their residence amounting to approximately $450,000,

and will be forever denied the right to return to the home they built for their retirement years.

The net effect of the application of the terms of the trial court's judgment in this matter was to permit the creditor Trans-West to foreclose its purported judgment lien based upon confession in a summary fashion without regard to and, in fact, in contravention of the statutory protections usually afforded judgment debtors, such as the one-year redemption period following the sale. California Code of Civil Procedure § 700a. In California, there is no right of redemption whatsoever after a non-judicial foreclosure or trustee's sale.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This matter presents very substantial federal questions under the bipartite analysis of this Court in its landmark cases of *D. H. Overmyer Co. v. Frick Company,* 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), and *Swarb v. Lennox,* 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972).

This case, as do many, falls somewhere between the separate and distinct lines of authority represented by *Overmyer* and *Swarb*. Debtors and creditors alike require guidance as to the effectiveness of confession of judgment statutes. Further, these particular Appellants have been particularly abused where not only has a suspect confession of judgment been permitted to be enforced, but the suspect confession of judgment was also permitted to be parlayed into a creditor's remedy more direct and dispositive than authorized by state law or permitted by considerations of due process.

Just last year, this Court had a potential opportunity to address these questions when certiorari was sought in the case of *County of Sonoma v. Isbell,* No. 78-440, 58 L.Ed.2d at 669. That case is reported below as *Isbell v. County of Sonoma,* 21 Cal.3d 61, 145 Cal.Rptr. 368, 577 P.2d 188 (1978), and dealt expressly with the constitutionality of the challenged state statutes. Unfortunately, the petition for certiorari was denied for failure to file the petition within the time allowed. 58 L.Ed.2d at 669.

Now, the Court again has an opportunity to deal with these substantial federal questions, provide guidance to debtors and creditors, and rectify the horrible inequities which have been visited upon the Appellants herein in the unlawful forfeiture of their equity in their home and the ouster from possession of their home.

CONCLUSION

For the reasons stated above, Appellants submit that this appeal brings before this Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution, and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

LOUIS E. GOEBEL

LUCE, FORWARD, HAMILTON & SCRIPPS

Counsel for Appellants

Dated: September, 1979

APPENDICES

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.
FILED
ROBERT L. FORD, Clerk
DEPUTY CLERK

CLIFFORD S. STRIKE, et al.,

Plaintiffs and Appellants,

v.

TRANS-WEST DISCOUNT CORPORATION, et al.,

Defendants and Respondents.

4 Civ. No. 16940

(Super. Ct. No. 386831)

APPEAL from a judgment of the Superior Court of San Diego County. William A. Yale, Judge. Affirmed.

Luce, Forward, Hamilton & Scripps, Edgar A. Luce, Jr., and Craig S. Andrews, for Plaintiffs and Appellants.

Gray, Cary, Ames & Frye, F. P. Crowell, and Brian L. Forbes, for Defendants and Respondents.

Plaintiffs Clifford S. Strike and Marjorie Stanley Strike (Strikes) sought injunctive relief to prevent a non-judicial foreclosure of a deed of trust by Trans-West Discount Corporation (Trans-West)[1] on the

FOOTNOTE 1: The first amended complaint also asked for an accounting of money owed Trans-West for declaratory relief concerning the parties' June 27, 1975, agreement, a decree quieting title and damages for fraud.

Strikes' Rancho Santa Fe residence. At the outset of these proceedings Strikes obtained a temporary restraining order preventing pendente lite a trustee's sale of the property. After a three-day trial, the court made appropriate findings and denied Strikes the relief sought. Specifically, the trial court set aside the temporary restraining order but vacated the prior notice of default to allow Strikes further opportunity to repay the money owed; the court decreed Trans-West was entitled to non-judicial foreclosure of its deed of trust with the right to credit bid the total amount owing by the Strikes. Strikes appeal this judgment.

FACTS

We view the evidence before this trial court -- as the law requires -- in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving any conflicts in support of the judgment (*Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429; *Hasson v. Ford Motor Co.*, 19 Cal.3d 530, 544); and stray not from the record before the trial court (*Knapp v. City of Newport Beach*, 186 Cal.App.2d 669, 679).

The facts are: In 1974 the Strikes built a residence in Rancho Santa Fe, California. To finance the construction, they borrowed funds from Barclays Bank and gave in return a first deed of trust (deed of trust) on the residence property, securing a promissory note in the principal amount of $105,000.

Mr. Strike was a director, Chairman of the Board of Superior Coating and Chemical Company (Superior). Mrs. Strike and her brother owned 100 percent of the Superior stock. Superior contracted to pay Mr. Strike $12,000 per year in consulting fees. Mr. Strike had been owner and president of a New York engineering and construction firm for 33 years. He owned hotels in Montego Bay, Jamaica, and had

done "millions of dollars of business" with Barclays Bank in New York, Montego and London.

Trans-West was a licensed personal property broker in the business of accounts receivable financing. It advanced funds to Superior on the strength of Superior's accounts receivable and personal guaranties of Superior's principals, including Mr. Strike.

On March 12, 1973, Mr. Strike signed a general continuing guaranty, personally guaranteeing the obligations of Superior to Trans-West. The continuing guaranty contained no limitation on Mr. Strike's liability. In April of 1974, Superior became insolvent and failed while indebted to Trans-West in the amount of $111,204.65.

On April 23, 1974, Mr. Strike acknowledged his obligation and, upon advice of his attorney, executed a confession of judgment in favor of Trans-West in the amount of $111,204.65. This confession of judgment was filed on April 25, 1974, in the Superior Court, Los Angeles, and judgment was entered thereon on May 9, 1974. Its validity and enforceability is not in question.

In June of 1975, Mr. Strike came to Trans-West asking for help. Barclays Bank had commenced foreclosure proceedings to satisfy the unpaid balance on their promissory note secured by the deed of trust on the Strikes property; the balance due on the note was $105,000 principal, and $20,711.24 of unpaid interest, taxes, trustee's fees, and costs, for a total of $125,711.24.

At Mr. Strike's request Trans-West agreed to purchase the note and deed of trust from Barclays Bank; the parties on June 27, 1975, entered into a comprehensive written agreement ("June agreement") whereby it was agreed Strikes would convey record title to the Rancho Santa Fe property to Trans-West, but Strikes had the right to a conveyance

upon the express conditions set forth in the written agreement. Pursuant to this "June agreement" Trans-West purchased for cash from Barclays Bank an assignment of the $105,000 note and deed of trust for $125,711.24, and Strikes executed and delivered to Trans-West a "grant deed" to the residence property; it was also agreed that Trans-West would postpone the pending foreclosure. Further, if Strikes paid $299,286.27 to Trans-West (the sum of the confession of judgment, plus Barclays Bank note, plus interest) by September 30, 1975, Trans-West would reconvey the Barclays Bank deed of trust, execute a satisfaction of judgment, and delivery (*sic*) a grant deed back to Strikes.

The "June agreement" obligated Strikes in the interim to make all payments on senior deeds of trust, real property taxes, and the Rancho Santa Fe (homeowner's) Association assessments, with the additional payment of two percent interest per month if Trans-West had to pay those items. Strikes were to retain possession of the property and pay for maintenance, utilities, and fire insurance.

The trial court found this "June agreement" was entered into with the intent of consolidating and extending the maturity date of Strikes' underlying obligations to Trans-West; neither party to the agreement was guilty of bad faith or overreaching; nor was the agreement procured by fraud, oppression, economic duress or mistake.

Upon Strikes' failure to comply with the terms of the "June agreement," Trans-West gave Strikes two extensions of time to repay the underlying obligations and to reacquire their title. The last extension expired March 31, 1976. Thereafter, Trans-West, relying on its recorded "grant deed," filed an unlawful detainer action in San Diego Superior Court seeking to evict Strikes. A final judgment on the merits was entered in that action denying the requested eviction on the

ground the "June agreement" and "grant deed" constituted only a security device in favor of Trans-West.

Trans-West then instructed the trustee to proceed with a trustee's sale under the deed of trust which Trans-West had acquired by assignment from Barclays Bank. The trustee gave notice of the contemplated sale, scheduled it for September 3, 1974. Strikes then brought this action and obtained a temporary restraining order preventing the trustee's sale.

While denying Strikes the relief sought and authorizing Trans-West's non-judicial foreclosure, the court concluded the "June agreement" violated statutory proscriptions pertaining to security agreements and usury, therefore was unenforceable, yet held it did not affect the validity and enforceability of their assigned trust deed and note or their confession of judgment. A declaration of rights was entered conformable with the court's findings and conclusions.

Strikes assert a multitude of errors were committed by the trial court. After analysis of both the factual and legal bases for Strikes' contentions, we conclude they are without merit and affirm the judgment. We detail and analyze the contentions in order of their presentation.

DISCUSSION

I

Strikes argue Trans-West was incapable of taking an assignment of the Barclays Bank deed of trust since it had a lien on the property, to-wit: a recorded abstract of judgment. They cite California Civil Code

section 2904[2] and 2876[3] and case authorities. Where the holder of a junior lien on property pays off the debt secured by a senior lien "to protect his interest," the junior lienholder thereby becomes subrogated to the rights of the senior lienholder "even though he takes no assignment of the senior lien." (*Stein v. Simpson,* 37 Cal.2d 79, 84.) In *Snider v. Basinger*, 61 Cal.App.3d 819, 822-823, the appeal court held tender of payments due on trust deed notes entitled Snider to an equitable lien by subrogation against the defendant Basinger's interest in the real property but Snider could not compel an assignment of the deeds of trust. From these sound legal premises, Strikes argue that Trans-West could obtain only an equitable lien (as opposed to an actual assignment) and therefore could not rely on the power of sale in the Barclays Bank trust deed. This reasoning is flawed for it departs from the facts in this case.

Substantial evidence here supports the trial court's conclusion that Trans-West did not act -- was not compelled -- to protect its position but rather to accommodate Strikes. Here, Trans-West *purchased* and *recorded* an assignment of Barclays Bank's trust deed.

FOOTNOTE 2: California Civil Code section 2904 provides: "One who has a lien inferior to another, upon the same property, has a right: 1. To redeem the property in the same manner as its owner might, from the superior lien; and, 2. *To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests,* upon satisfying the claim secured thereby." (Italics added.)

FOOTNOTE 3: California Civil Code section 2876 provides: "Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists."

In *Stein, supra,* relied upon by Strikes, on payment of the indebtedness owed on the first trust deed "Simpson did not secure from the bank an assignment of said indebtedness. . . ." (*Stein v. Simpson, supra,* 37 Cal.2d 79, 82.)

From the sound legal premise that a junior lien holder who makes payments due on the senior lien *may not* compel assignment rights from the senior lienholder (*Snider v. Basinger, supra,* 61 Cal.App.3d 819), Strikes would draw conclusions which do not follow as a matter of law or reason. Trans-West as a junior lienholder was under no legal or equitable disability preventing its acquisition of the Barclays Bank trust deed by assignment, together with all of Barclays' rights and remedies including the right to exercise the power of sale. This Trans-West did. The limits on power of sale contained in Civil Code section 2924 have no application. We repeat: Because the trust deed here foreclosed upon was *assigned* upon consideration by Barclays Bank to Trans-West, the equitable mortgage principles requiring judicial foreclosure under Code of Civil Procedure section 726 have no application.

II

Strikes next argue: "Even if the assignment was valid, the doctrine of merger operates to extinguish the deed of trust." Without evidence, Strikes assert Trans-West intended to merge the acquired deed of trust and the confession of judgment lien into the "June agreement" and the grant deed resulting therefrom.

Again, Strikes call our attention to sound fundamental rules. A lien is extinguished by merger when a lienholder acquires ownership of the property. (*Ralph C. Sutro Co. v. Paramount Plastering, Inc.,* 216 Cal.App.2d 433.) As the California Supreme Court in *Rumpp v. Gerkens,* 59 Cal. 496, stated:

> "In law, a merger always takes place when a greater estate and a less coincide and meet in the same person in one and the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a Court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished where it would continue to exist at law; and sometimes preserve it, when at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united. [Citations.]" (*Id.* at pp. 501-502.)

And the court in *Union Bank v. Wendland*, 54 Cal.App.3d 393, repeated the rules:

> "A 'merger' occurs when a greater estate and a lesser coincide in the same person in one and the same right without any intermediate estate. [Citations.]"

and held:

> "Here the second deed of trust was the lesser estate. It was annihilated or merged in the greater estate, i.e., the first deed of trust, without any intermediate estate intervening. The question is one of intent, actual or presumed, of the person in whom the interests are united. [Citations.]"

The difficulty with Strikes' contention is it is contrary to the factual finding of the court, and therefore suggests correct rules of law inapplicable to the facts here. The trial court expressly found the acquisition by Trans-West of the Barclays Bank deed of trust *did not* constitute a merger of title between Trans-West's security interest and its "legal title" as evidenced by the "grant deed"; and the "June agreement" *did not* constitute a merger. Here the trial court found the Strikes retained title to the property at all times. The "grant deed" was

simply a security device so determined in the unlawful detainer litigation between these same parties. Therefore, there was no *title* in Trans-West into which its security devices -- trust deed and judgment lien -- could merge.

The law is clear that merger is a question of intent of the person in whom the interests are united. This is a fact question. Strikes have failed to carry the burden of proof on this factual issue. As was said in *Ito v. Schiller,* 213 Cal. 632, 635:

> "A merger does not always follow the union of a greater and lesser estate in the same onwership. (*sic*) The question is one of intention, actual or presumed, of the person in whom the interests are united, the evidence in this cause being sufficient to show the true intention of appellants to have been as found by the court. The rule is stated in *Jameson v. Hayward* . . . as follows: '. . . Equity will prevent or permit a merger, as will best subserve the purposes of justice, and the actual and just intent of the parties. . . . In the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, *would be best subserved by keeping them separate, the intent so to do will ordinarily be implied.*' [Italics added.] [Citations.]"

Clearly here, Trans-West's interests would be "best subserved" by intending no merger. Further, substantial evidence supports the trial court's finding of no intent to merge. The provision in the "June agreement" for full reconveyance is inconsistent with a merger intent.

Finally, if there had been a merger as between the trust deed and the judgment lien, the lesser would have been extinguished, merged into the greater, the senior security, the deed of trust. (*Union Bank v. Wendland, supra,* 54 Cal.App.3d 393, 406.)

III

Strikes next contend (on their assumptions "the assignment was valid" and "there was no merger") that Trans-West could obtain *only* an equitable lien which can be foreclosed only by judicial processes under Code of Civil Procedure section 726. To arrive at this conclusion, Strikes misread *Snider v. Basinger* (61 Cal.App.3d 819) and does not make these necessary distinctions: "Assignment of an assignable cause of actin is but one of the recognized forms of subrogation." (*Meyers v. Bank of America, etc. Assn.*, 11 Cal.2d 92, 94.) Equitable subrogation rights are to be distinguished from an assignment. (*Id.* at pp. 96-97.)

A recorded assignment of note and deed of trust vests in the assignee all of the rights, interests of the beneficiary (*Musgrave v. Renkin*, 180 Cal. 785) including authority to exercise any power of sale given the beneficiary (Civ. Code, § 858). The equitable subrogee to a senior lienholder's right, on the other hand, does not have identical rights, e.g., he cannot compel a written *assignment*. (*Snider v. Basinger, supra*, 61 Cal.App.3d 819, 824.) He cannot foreclose by non-judicial process as can the assignee of such rights by written instrument. (Code Civ. Proc., § 726.) The power of sale here derived from the instrument itself. (Civ. Code, § 2932; *McDonald v. Smoke Creek Livestock Co.*, 209 Cal. 231, 235-236.)

IV

Strikes next assert trial court error in allowing Trans-West interest on the note secured by the deed of trust and the confession of judgment after a finding of usury. It is also argued that by reason of Trans-West's successful credit bid at the non-judicial foreclosure sale, Trans-West has collected usurious interest. Accordingly, Strikes claim treble damages therefor.

It is true the trial court found the "June agreement" providing for interest at the rate of two percent per month was usurious; and Trans-West's personal property exemption from California usury laws was held inapplicable. Moreover, the rule is well settled that no interest whatsoever can be claimed by the usurious lender. (*Rochester Capital Leasing Corp. v. K & L Litho Corp.*, 13 Cal.App.3d 697, 703.) The obligation to pay interest is void. (*Verbeck v. Clymer*, 202 Cal. 557, 562.)

These rules authorize the trial court's holding the "June agreement" unenforceable, and no interest recoverable. However, the determination that the "June agreement" was usurious did not include a finding, and there is no evidence, that the confession of judgment on Barclays Bank note and trust deed were usurious transactions. Therefore, the trial court correctly declared Trans-West was entitled to recover the legal interest provided for in the judgment by confession and the Barclays Bank trust deed. The unenforceability of the subsequent "June agreement" did not affect in any manner these pre-existing concededly lawful documents.

Strikes' reliance upon *Maze v. Sycamore Homes, Inc.*, 230 Cal.App.2d 746 is misplaced. In *Maze* the underlying investment agreement as well as the extension of that agreement was usurious. The appeal court held the entire transaction was tainted with usury and no interest recoverable. (*Id.* at p. 755.) Here, to the contrary, there is the express finding that the confession of judgment and trust deed promissory note are *not* tainted by usury.

V

Finally, Strikes contend error in that the judgment allows Trans-West to receive 11 percent interest on the Barclays Bank note, inasmuch as Trans-West does not enjoy the exemption from the usury law as did its assignor Barclays Bank. No authority is cited for the proposition that the assignee of an exempt lender becomes thereby a usurer unable to collect any interest.

The California Constitution, article XV, section 1, exempts certain institutions, such as banks, from the usury laws. Strikes' contention would in effect prohibit -- make uneconomic -- the assignment or sale by banks of their commercial property to a secondary market. This would be disastrous in terms of bank operations and not conformable to the public policy exempting banks in the first instance.

Further, a contract, no usurious in its inception, does not become usurious by subsequent events. (*Cambridge Dev. Co. v. U.S. Financial,* 11 Cal.App.3d 1025, 1031; *Boerner v. Colwell,* 21 Cal.3d 37, 53.) In contrast, *Calimpco, Inc. v. Warden,* 100 Cal.App.2d 429, the contract was usurious at its inception; the appeal court held the assignee of such usurious contract who intentionally received usurious interest was liable for the statutory penalties. (*Id.* at p. 446.) There is no merit in this contention.

VI

Finally, Strikes assert, by reason of Trans-West's credit bid at the trustee's sale, it collected usurious interest and is liable for treble damages. This contention rests on no facts. Again the trial court disallowed *any* interest on the usurious "June agreement." The interest allowed was lawful; it flowed from untainted sources.

Nor are the Strikes entitled to attorney fees by virtue of Civil Code section 1717. They were not the "prevailing party"; rather, the trial court properly awarded attorney fees to Trans-West. The judgment was entered in *favor* of Trans-West. That judgment determining the rights of the parties and the prevailing party is supported by substantial evidence and sound legal principles.

Judgment affirmed.

CERTIFIED FOR PUBLICATION.

Stanforth
J.

WE CONCUR:

Brown
P.J.

Compton
J.

B-1

GRAY, CARY, AMES & FRYE
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ENTERED

AUG 22 1977

FILED
Robert D. Zumwalt, Clerk
AUG 19 1977
BY K. GREENING, Deputy

Attorneys for: Defendants

1113 307
Judgment Book ___ Pg. ___

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CLIFFORD S. STRIKE and MARJORIE STANLEY STRIKE, Plaintiffs, vs. TRANS-WEST DISCOUNT CORPORATION, T.D. SERVICE COMPANY, and DOES I through X, inclusive, Defendants.	No. 386831 **JUDGMENT UPON COURT TRIAL**

The trial of the above-entitled action came on regularly on June 29 and 30 and July 5, 1977, in Department 25 of the above-entitled court, the Honorable William A. Yale, Judge, presiding, a jury having been waived by the parties, and the plaintiffs and cross-defendants Clifford S. Strike and Marjorie Stanley Strike (hereinafter STRIKE) being represented by John DaCorsi and David Bilford of the firm of DaCorsi and Cort, and defendants and cross-complainants, Trans-West Discount Corporation and T-D Service Company being

represented by F.P. Crowell of the firm of Gray, Cary, Ames & Frye, and evidence both oral and documentary having been presented, and the matter argued and submitted, and findings of fact and conclusions of law not having been requested, the Court now renders its judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs STRIKE have and recover nothing by their Complaint herein from either defendant, and that the defendants have and recover from plaintiffs their costs of court in the sum of $708.23; and that the preliminary injunction heretofore granted is hereby dissolved.

ORDERED FURTHER that defendant and cross-complainant TRANS-WEST DISCOUNT CORPORATION (hereinafter TRANS-WEST) have and recover judgment on its Cross-Complaint against plaintiffs STRIKE as follows:

1. The Court hereby declares the rights and obligations of the parties under the written agreement of June 25, 1975, (Exhibit 7 in evidence) to be as follows:

(a) Said agreement, together with the grant deed executed by plaintiffs STRIKE to TRANS-WEST of June 25, 1975, (Exhibit A in evidence) constituted a security device and was additional security to TRANS-WEST for its judgment of April 23, 1974, (Exhibit 4 in evidence) and the trust deed and note of Barclay's Bank (Exhibits HH and II in evidence) acquired by TRANS-WEST;

(b) Neither party to said agreement was guilty of bad faith or overreaching;

(c) Said agreement covered real property in the Rancho Santa Fe area of San Diego County, as more fully described in said agreement, which property description is incorporated herein by this reference;

(d) The acquisition by TRANS-WEST of the Barclay's Bank Trust Deed did not constitute a merger of title between TRANS-WEST's security interest and its legal title in said real property as evidenced by the grant deed of June 25, 1975;

(e) TRANS-WEST is not entitled to charge interest at 2% on said June 27, 1975 agreement, and its personal property broker's exemption from the usury laws of the State of California is inapplicable thereto;

(f) The judgment by confession by STRIKE to TRANS-WEST of April 23, 1975, was and is valid and enforceable according to its tenor in the principal amount of $111,204.65, together with interest thereon at the rate of 7% per annum until paid, less a credit to which STRIKE is entitled of $2,033.44;

(g) TRANS-WEST is the owner and holder, by virtue of a valid assignment, and is entitled to enforce according to its tenor the Trust Deed dated July 10, 1973, given by STRIKE to Barclay's Bank and recorded July 12, 1973, in the office of the San Diego County Recorder as file/page number 73-192739, and is the owner and holder of the promissory note in the original principal amount, together with interest and costs at the time of the assignment on July 9, 1975, was the total amount of $125,711.24;

(h) TRANS-WEST is entitled to said sum of $125,711.24, together with interest thereon at 11% per annum as set forth in said promissory note from July 9, 1975, until paid;

(i) Subsequent to such assignment and acquisition by TRANS-WEST, it has expended the additional sum of $800.00 in additional foreclosure costs, to which it is entitled to reimbursement from July 30, 1975, together with interest thereon at 11% per annum until paid, all of which sum is secured by said Trust Deed;

(j) TRANS-WEST is entitled to the sum of $7,500.00 attorneys' fees for its successful defense of the validity of said Barclay's Bank Trust Deed;

(k) The notice of default and election to sell under said Trust Deed is, as a matter of equity, hereby vacated and TRANS-WEST is entitled forthwith to re-notice said non-judicial foreclosure;

(l) Should TRANS-WEST pursue said non-judicial foreclosure, it may, at its option, submit as a credit bid, not only the amount due under the Barclay's Bank Trust Deed, but also the amount due on its said judgment by confession; said amounts are set forth in the attached Exhibit "A."

(m) Alternatively, TRANS-WEST is entitled to a decree of foreclosure and order of sale from this court, authorizing and directing immediate judicial foreclosure of the security agreement consisting of the agreement of June 27, 1975, and grant deed of June 25, 1975, both of which have previously been determined in San Diego Superior Court action number 380510 to have been and constituted a mortgage, and which together secure all the monetary obligations set forth in Paragraphs (f), (h) and (i) hereof and in the attached Exhibit "A";

(n) Plaintiff MARJORIE STANLEY STRIKE, by her actions in executing the June 27, 1975, agreement and the deed of June 25, 1975, has acknowledged and ratified the monetary obligations hereinabove set forth as being her own, so as to bind and obligate her share of the community assets and property thereto.

2. Pending the foreclosure, the STRIKES shall commit no waste, damage or mischief on the said Rancho Santa Fe real property hereinabove described nor to any improvement, fixture or appurtenance thereon, nor any part thereof, and shall maintain and keep the

same in all respects in a proper manner consistent with their prior operation and maintenance of said property, including all improvements and groves thereon, and shall not cause nor suffer to be removed, destroyed nor impaired, the improvements, appurtenances, fixtures or any portion thereof.

3. This Court shall retain jurisdiction over this matter to resolve all further and additional disputes or questions arising between the parties and in order to carry out and perform the declarations and orders herein made.

DATED: AUG 19 1977

William A. Yale

JUDGE OF THE SUPERIOR COURT

WILLIAM A. YALE

ANALYSIS OF AMOUNT DUE FROM STRIKE TO TRANS-WEST

I.	4-23-74 Confession of Judgment	$111,204.65	
	less payments during 1974	-2,033.44	
	principal	$109,171.21	
	accrued interest at 7% per annum		
	(a) 4-24-74 thru 7-8-77 = 3 years 75 days		
	(b) Annual interest rate = 109,171.21 x 7% - $7,641.98		
	(c) Daily interest rate = 7,641.98 / 365 = $20.94		
	3 years x 7,641.98 =	$22,925.94	
	75 days x 20.94 =	1,570.50	
	net interest thru 7-8-77	$24,496.44	
	Principal and interest due on Confession of Judgment (plus $20.94 per day from 7-8-77)		$133,667.65
II.	7-9-75 Barclays Bank Trust Deed	$125,711.24	
	plus cash advance 7-30-75	800.00	
	principal	$126,511.24	
	accrued interest at 11% per annum		
	(a) 7-10-75 thru 7-8-77 = 1 year 363 days		
	(b) Annual interest rate = $126,511.24 x 11% = $13,916.24		
	(c) Daily interest rate = 13,916.24 / 365 = $38.13		
	1 year x 13,916.24 =	$13,916.24	
	363 days x 38.13 =	13,841.19	
	net interest thru 7-8-77	$27,757.43	
	Principal and interest due on Trust Deed (plus $38.13 per day from 7-8-77)		$154,268.67
III.	Attorneys' fees		7,500.00
IV.	Grand Total		$295,436.32
	(plus $59.07 per day from 7-8-77)		

exhibit "A"

COURT OF APPEAL - FOURTH DIST.
FILED
SEP 18 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

4 Civil 16904

(Superior Court,
San Diego County
No. 386831)

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

CLIFFORD S. STRIKE and
MARJORIE STANLEY STRIKE,

Plaintiffs and Appellants,

vs.

TRANS-WEST DISCOUNT CORPORATION,
T.D. SERVICE COMPANY, and
DOES 1 through C, Inclusive,

Defendants and Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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4 Civil 16904

(Superior Court,
San Diego County
No. 386831)

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

CLIFFORD S. STRIKE and
MARJORIE STANLEY STRIKE,

Plaintiffs and Appellants,

vs.

TRANS-WEST DISCOUNT CORPORATION,
T.D. SERVICE COMPANY, and
DOES I through C, Inclusive,

Defendants and Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that CLIFFORD S. STRIKE and MARJORIE STANLEY STRIKE, Plaintiffs and Appellants above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered in this action on June 27, 1979, denying hearing after decision by the Court of Appeal, Fourth Appellate District.

This appeal is taken pursuant to Title 28, U.S.C., §1257(2).

DATED: September 18, 1979

Respectfully submitted,

LUCE, FORWARD, HAMILTON & SCRIPPS

By _____

Louis E. Goebel

Attorneys for Plaintiffs and
Appellants Clifford S. Strike
and Marjorie Stanley Strike

Supreme Court, U. S.
FILED
OCT 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-502

CLIFFORD S. STRIKE and
MARJORIE STANLEY STRIKE,

Appellants,

v.

TRANS-WEST DISCOUNT CORPORATION,
T.D. SERVICE COMPANY,

Appellees.

On Appeal From The Fourth District Court Of
Appeal Of The State Of California

MOTION TO DISMISS

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Dated: October, 1979

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-502

CLIFFORD S. STRIKE and
MARJORIE STANLEY STRIKE,
Appellants,

v.

TRANS-WEST DISCOUNT CORPORATION,
T.D. SERVICE COMPANY,
Appellees.

On Appeal From The Fourth District Court Of
Appeal Of The State Of California

MOTION TO DISMISS

The Appellees move the Court to dismiss this appeal pursuant to Rule 16 on the grounds that (a) the appeal is not within the jurisdiction of this Court because not taken in conformity to statute and the rules of this Court, and (b) the federal question sought to be reviewed was neither properly raised nor expressly passed on below.

I

INTRODUCTION

Appellants ("STRIKE") sued for injunctive and declaratory relief to prevent appellee ("TRANS-WEST") from foreclosing a deed of trust pursuant to California Civil Code Section 2924. While STRIKE's complaint asserted the invalidity of a security agreement between the parties on the grounds that "said agreement was executed under duress, is violative of public policy, is usurious, is illegal, and was not supported by adequate consideration" (First Amended Complaint, 6:24-26), the complaint did not draw into question the validity of any state statute.

The trial court ultimately dissolved STRIKE's preliminary injunction and entered a declaratory judgment in favor of TRANS-WEST, confirming TRANS-WEST's right to non-judicially foreclose its trust deed.

STRIKE appealed to California's Fourth District Court of Appeal, contending that under California law, the deed of trust was in fact an "equitable lien" which could not be nonjudicially foreclosed, that the trial court misapplied the usury law, and that the trial court erroneously awarded attorneys' fees. On appeal, as in the trial court, STRIKE did not question the validity of any statute.

The decision of the Fourth District Court of Appeal (filed May 3, 1979) is attached as Appendix "A" to STRIKE's Jurisdictional Statement. Notwithstanding STRIKE's representations to this Court, that decision does not uphold the validity of California's Confession of Judgment Statute against

a claim of repugnancy to the United States Constitution. The decision makes no mention of that statute (California Code of Civil Procedure §§ 1132-34). Not only was the validity of that statute not raised at trial, it was never raised until after the District Court of Appeal had rendered its decision! The decision shows on its face that the constitutionality of the California Confession of Judgment statute was never an issue. Regarding the Confession of Judgment, the decision of the Court of Appeal states: "Its validity and enforceability is not in question." See *Strike v. Trans-West,* 92 Cal.App.3d 735, 739 (1979); STRIKE's Jurisdictional Statement at A-3.

After the decision had been rendered, STRIKE petitioned the Court of Appeal for a rehearing contending that the Judgment was erroneous "because it fails to recognize the potential invalidity" of a Confession of Judgment pursuant to California Code of Civil Procedure § 1133. The point had never been previously raised and under California procedure it was not properly before the court. The Court of Appeal properly denied a rehearing, after which the California Supreme Court properly denied a hearing.

II

ARGUMENT

A. The Appeal Is Not Within The Jurisdiction Of This Court, Because Not Taken In Conformity To Statute And The Rules Of This Court.

STRIKE purports to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2). It will be demonstrated (*infra*, part B) that that statute does not apply since no Federal question was presented below.

Where a state supreme court denies a hearing, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under Section 1257. *Sullivan v. Texas*, 207 U.S. 416 (1908); *American Ry. Exp. Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Hammerstein v. Superior Ct.*, 341 U.S. 491, 492 (1951); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678, n. 1 (1968).

The decision of the Fourth District Court of Appeal (Appendix "A" to STRIKE's Jurisdictional Statement) was filed on May 3, 1979. Under Rule 11(3), in order to timely appeal to this Court, STRIKE was required to file his notice of appeal within the time allowed by law and to docket the case within the time provided in Rule 13.

Under Rule 2(a) of the California Rules of Court, the notice of appeal had to be filed within 60 days after notice of entry of judgment (by July 2, 1979). STRIKE's notice of appeal was not filed until September 18, 1979. (See Appendix "C" to STRIKE's Jurisdictional Statement.) Rule 13 of the United States

Supreme Court requires that the case be docketed not more than 90 days after entry of the judgment appealed from. The judgment appealed from was entered on May 3, 1979, and the appeal had to be docketed under Rule 13 not later than August 1, 1979. It was not docketed until September 25, 1979.

B. The "Federal Question" Sought To Be Reviewed Was Neither Properly Raised Nor Passed On Below.

STRIKE apparently contends that the decision below upholds the validity of the California Confession of Judgment statute (Cal. Code Civ. Proc. §§ 1132-34), and that the validity of that statute was drawn into question below on the ground of its being repugnant to the Fifth and Fourteenth Amendments to the United States Constitution. 28 U.S.C. § 1257(2) confers limited jurisdiction upon this Court: the judgment appealed from must reflect a substantial federal question that has been properly raised and necessarily decided in the state court proceedings.

It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question has been properly raised in the state court proceedings. The proper method of raising the federal question is dependent upon the particular state practice. See *Central Union Co. v. Edwardsville*, 269 U.S. 190, 194-195 (1925); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-463 (1936); *Parker v. Illinois*, 333 U.S. 571, 574-575 (1948).

In California, matters never called to the attention of the trial court are beyond the record and must be disregarded on appeal.

Knapp v. Newport Beach, 186 Cal.App.2d 669, 679 (1960). Here there is no mention of the California Confession of Judgment statute in the record. Its alleged invalidity was never raised before the decision *on appeal* had been filed. The issue was not before the trial court and it was not before the Court of Appeal.

The Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). Where the highest state court fails or refuses to pass expressly upon the federal question, the burden is upon the appellant to show that he properly raised to question (*i.e.,* that the state court's failure to deal with it was not for want of proper presentation). When the highest state court has failed to pass upon a federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York,* 394 U.S. 576 (1969). STRIKE does not meet his burden in this regard and his Jurisdictional Statement is therefore deficient under Rule 15(1)(d).

The failure to raise the federal question at trial precludes Supreme Court review. See *Hulbert v. Chicago,* 202 U.S. 275, 279-281 (1906); *Edelman v. California,* 344 U.S. 357 (1953); *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 309 (1903). Where, as here, the constitutional issue is not raised at trial, as required by state law, but is raised for the first time in a petition for rehearing addressed to the state intermediate court, which does not address or decide the issue, the highest state court's action in refusing without opinion to hear the case precludes review by the Supreme Court. *Stembridge v. Georgia,* 343 U.S. 541, 547 (1952). Briefs before the state courts are not ordinarily

part of any record filed with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Ass'n. v. Railroad Commission,* 269 U.S. 354, 357-358 (1926); *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54 (1934).

Moreover, in the instant case the alleged federal question was not properly presented below even when (as an after thought) STRIKE belatedly purported to raise it. In the petition for rehearing in the intermediate court, (where STRIKE first attacked this Confession of Judgment statute) STRIKE merely pointed out that the California Supreme Court in a different case had held the statute "unconstitutional as a violation of due process." The same statement was made in STRIKE's petition for hearing in the California Supreme Court. Neither petition framed any federal question within the meaning of Section 1275. As stated in *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897); "the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." Here there was neither reference to the particular clause of the Federal Constitution relied upon nor the rights claimed thereunder. This Court has held insufficient mere reference to the "Constitution of the United States" (*Herndon v. Georgia,* 295 U.S. 441, 442-443 (1935)) or the "Constitution and laws of the United States," (*Oxley Stave Co. v. Butler County,* 166 U.S. 648, 656 (1897)), or "due process of law" (*Bowe v. Scott,* 233 U.S. 658, 664-665 (1914)).

As stated in *New York Central R. Co. v. New York,* 186 U.S. 269, 273 (1902), "it is well settled in this court that it must be

made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and such provision must be set forth." Hence if the claim is made that a state statute is "unconstitutional" or that it denies "constitutional rights," it will be assumed that reference is being made to the State Constitution and rights thereunder rather than to the Federal Constitution. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928). Where, as here, the state constitution has a due process clause, a claim that "due process" has been violated will be deemed to relate to that clause (*Bowe v. Scott, supra*, 233 U.S. 658, 664-665 (1914)) and there will be no federal question to be reviewed. Where, as in the instant case, no Federal question was properly presented below, the Supreme Court should summarily dismiss the appeal. See *Ford Motor Co. v. Pace*, 364 U.S. 444 (1960); *Anderson v. Thorington Construction Co.*, 363 U.S. 719 (1960).

III

CONCLUSION

The instant appeal is from a state intermediate appellate court decision, which shows on its face that the appeal is not within the jurisdiction of this Court. The decision does not meet the requirements of 28 U.S.C. § 1257(2), and the appeal has not been perfected in accordance with the rules of this Court. Moreover, the decision below decided no federal question; none was properly presented. The appeal should be summarily dismissed.

Respectfully submitted,

F. P. CROWELL
BRIAN L. FORBES

GRAY, CARY, AMES & FRYE

Counsel for Appellees

DATED: October, 1979